IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 198

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Plaintiff in Error,

vs.

CENTRAL IRON & COAL COMPANY,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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ALLEGED INCORRECT STATEMENT OF CASE IN OUR OPENING BRIEF.

On page 9 of the brief of defendant in error it is said that we were mistaken in stating in our opening brief that a demand was made on the consignor before suit was brought.

It is true that no testimony was introduced on this point, but the writer of the opening brief of plaintiff in error was of opinion that failure on the part of defendant in error to deny specifically, in any of the voluminous pleadings filed, the allegation in the complaint that a demand was made was a sufficient basis for the statement to which exception is taken.

However, be that as it may, the argument on pages

16 and 17 of our main brief will be just as strong if the reference to a demand before suit is stricken from it.

Our Comment as to Routing, Proper.

On pages 41-43 of defendant in error's brief objection is made to the statement in our main brief that if all parties had been before the court and the court had been called upon to decide which one of them was equitably liable for the undercharge, the finding might have been different because there was nothing to show that defendant in error was authorized or directed to ship the coke over the route inserted by it in the bills of lading, or whether or not that was the cheapest reasonable route.

The Circuit Court of Appeals said:

> "The facts clearly established that the corporation (ultimate consignee) was the party liable for the carrier's charge."

The point we sought to make was that in this case a finding as to the status and liability of some one not a party to the record might be different if he was a party and at liberty to prove his side of the case and bound by any decision made.

The whole argument of defendant in error is that it was not equitably liable and an injustice would result if it were held liable in this case.

It is our view that when a defendant seeks to escape liability on a plea of that kind, the burden is on such defendant to prove its case.

There is proof here that the coal company sold the coke to Tutwiler & Brooks f. o. b. Holt, Alabama, and that "under and in pursuance of instructions from them, consigned said coke to said Tutwiler & Brooks at Mayer, Arizona." (Trans., 35.)

There is no proof that it was directed to route the shipments. We think that as a part of its case the coal company, before it could escape liability on any equitable plea, would be compelled to go further and show either that it received routing instructions or that it routed the shipments via the "cheapest reasonable route."

Prior to June 18, 1910, the shipper had no right to route freight (*Southern Pacific Co.* v. *Interstate Commerce Commission*, 200 U. S. 346), but by Act of Congress of that date (36 Stat. L. 539) such right was specifically conferred. But long prior to that time and ever since the carrier was required upon receiving an unrouted shipment to transport it over the "cheapest reasonable route." I. C. C. Conference Ruling 214, paragraph (c).

It will be seen, therefore, that the coal company was not bound to route the shipments. It could have delivered them unrouted and complied with its contract and the consignee would have had to pay only the rate applicable over the cheapest reasonable route.

There is no presumption that the route inserted by the coal company in the bill of lading was or was not such a route, nor is there any proof.

What we tried to say in our opening brief was that the defendant failed to show any authority for its act of routing the shipments and also failed to show that its act was a proper one. Clearly the defendant failed to make out its equitable case.

Alleged Unusual Form of Bill of Lading.

The first three or four pages of defendant in error's brief are devoted to calling the court's attention to the alleged unusual form of bills of lading in this case. They

were simply order bills as the term is commonly used and defined by statute. See Section 3, Bills of Lading Act, 39 Stat. L. 538.

Upon the execution of these bills of lading the carrier received notice that the coal company probably would not be the owner of the shipments in transit and that Tutwiler & Brooks probably would be the owners, unless and until they endorsed and delivered the bills of lading over to some one else, thereby passing title.

In the case of an ordinary straight bill of lading the legal presumption is that the consignee becomes the owner of a shipment upon delivery to the carrier and the execution of the bill of lading. The consignor, solely by reason of the fact that he is such, has no right to divert or give further or other directions unless circumstances arise making it proper for him to exercise his right of stoppage *in transitu.*

But the form of a bill of lading does not determine title. "The legal presumption is that when goods are sent to a consignee, the title to them vests in him as soon as the shipment is made. It is solely, however, a question of intention or of agreement, and may be shown to be otherwise." (Hutchinson on Carriers, Third Edition, Section 194, pp. 211-212.)

So in this case if the coke in question had been shipped on an ordinary straight bill of lading in which the coal company was shown as consignor and Tutwiler & Brooks, or anyone else, as consignee, the carrier would have had just as much notice that the shipper had parted with title as it had under the bills of lading actually used.

We gather that counsel, by devoting so much space at the outset of his brief and in various other portions thereof to calling the court's attention to the form of

the bills of lading, is thereby attempting to distinguish the facts in this case from the numerous cases cited in our opening brief.

This was the course pursued by counsel for defendant in the case of *New York Central R. R. Co.* v. *Federal Sugar Refining Co.* 235 N. Y. 182, 139 N. E. 324, referred to on pages 22 and 23 of our main brief. In that case counsel was successful in persuading the Appellate Division (194 N. Y. S. 467) that an order bill of lading exonerated the consignor, but the Court of Appeals took a different view.

The Zemurray Case.

Inasmuch as the case of *Yazoo & M. V. R. Co.* v. *Zemurray,* 238 Fed. 789, is referred to a number of times in the briefs of both parties and is relied upon by the Circuit Court of Appeals in its opinion, we have for the convenience of the court printed the opinion in full as an appendix to this brief.

Respectfully submitted,

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APPENDIX.

OPINION OF THE COURT IN THE CASE OF YAZOO & M. V. R. CO. v. ZEMURRAY, 238 Fed. 789.

PARDEE, *Circuit Judge.* The facts of this case and the reasons for judgment in the District Court are fully stated in the opinion of the court overruling the motion for a new trial, as follows:

"In this case the plaintiff sues for $36 freight on a shipment from New Orleans, La., to Natchez, Miss. The jury was waived, and the case tried in open court on the pleadings, admissions of counsel, and some evidence. The facts are not in dispute, and are as follows: Zemurray sold a carload of ripe bananas to A. Pegano at Natchez, Miss., terms f. o. b. New Orleans, La., but before shipping them required the purchaser to deposit the price in a bank in Natchez subject to his draft. The car was shipped consigned to Pegano, and the railroad issued its bill of lading in the usual form. The proper amount of freight was $45, but the railroad made delivery to Pegano and by error collected only $9. Thereafter, demand was made on Pegano for the balance. He did not pay. The attorneys for the railroad wrote him several letters, but did not sue him. The railroad made demand on Zemurray. He advised it of his method of making the sale, declined to pay the difference in freight, and subsequently advised the railroad of other shipments made to Pegano that might have been reached by process. It is not shown that Pegano was insolvent, and he was doing business at the time this suit was entered. There was judgment in favor of the defendant, and plaintiff has applied for a new trial.

The plaintiff contends that a carrier may waive its lien and deliver the freight and hold either the consignee or consignor, and this regardless of the usual clauses in bills of lading as to delivery to the consignees, he paying freight, and regardless of the ownership of the goods. Many cases have been cited, and the rule contended for seems to be supported by the weight of authority.

However, in deciding the case against the plaintiff, I did so because I was satisfied the railroad could have collected from the consignee, if it had sued him; that having elected to collect the freight from the consignee, who was the owner of the fruit and bound to pay the freight ultimately, it would be inequitable to permit the carrier to change its base and proceed against the consignor, who was only technically liable. Conceding that Zemurray was primarily liable to the railroad because of having made the contract, the mode of shipment was *prima facie* notice to the carrier that the shipper had parted with ownership on delivery of the goods to it and that the shipment was for account of the consignee. Before suit the railroad was advised of the actual facts, and property of the consignee subject to execution pointed out. Considering all this, I see no reason to change my opinion.

The motion for a new trial will be denied."

We might rest our decision upon the facts and reasons as given by Judge Foster, but we deem it proper to go further.

On the facts stated, we doubt the jurisdiction of the court on the ground that the amount involved is less than $3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier through error and neglect failed to collect the stipulated freight from the consignee, and now sues the consignor.

We find no question in this case involving the Elkins law, or any other interstate commerce laws.

Since the shipment was regular in all respects and the only thing complained of is the failure of parties responsible to pay the freight, we are also of opinion that even on the case made the plaintiff in error delayed too long to bring suit, and his claim is prescribed under Louisiana law by three years as pleaded in the case.

Waiving, however, the question of jurisdiction, we find no reversible error in the proceedings of the District Court.

JUDGMENT AFFIRMED, WITH COSTS.